UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SEAN PATRICK DOYLE,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL.,

Defendants.

Case No. 12-cv-2769-YGR

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 200

On May 30, 2012, plaintiff Sean Patrick Doyle, a state prisoner then housed at the California Correctional Training Facility ("CTF"), filed this civil rights action under 42 U.S.C. section 1983, alleging that prison officials at CTF were deliberately indifferent to his serious medical needs. Specifically, Mr. Doyle asserts that while he was housed at CTF in Soledad, California, defendants acted with deliberate indifference to his serious medical needs by repeatedly denying him medical treatment for his lumbar (back) and cervical (neck) pain in violation of the Eight Amendment to the United States Constitution. Plaintiff also brings state law tort claims for negligence and negligence per se against defendants arising out of the same alleged conduct.

Before the Court is defendants' motion for summary judgment. (Dkt. No. 200, "Mtn."). The motion is fully briefed and came for hearing on September 8, 2015. Having carefully considered the papers submitted and being fully informed, and for the reasons set forth below, the Court hereby **GRANTS IN PART** defendants' motion for summary judgment.

I. BACKGROUND

Mr. Doyle filed his second amended complaint (Dkt. No. 167, "SAC") on January 30, 2015 pursuant to the Court's order granting in part plaintiff's motion for leave to amend. (Dkt. No. 165.) In his SAC, Mr. Doyle alleges three claims for relief, namely: (1) violations of 42 U.S.C. section 1983; (2) negligence; and (3) negligence per se. Mr. Doyle names four former and current employees of the California Department of Corrections and Rehabilitations ("CDCR") as defendants: Dr. Kuersten, Dr. Sepulveda, and administrators Ellis and Zamora. In support of these claims, Mr. Doyle alleges that defendants repeatedly denied and refused to provide him with medically necessary prescriptions and surgeries. (*See* SAC.) Mr. Doyle seeks money damages in addition to injunctive relief ordering defendants to provide Mr. Doyle with his requested back surgery, epidural steroid injections, and "necessary medications." (*See id*.)

A. Plaintiff's History of Lumbar (Back) and Cervical (Neck) Pain

Mr. Doyle has experienced back pain since at least 2005 when neurosurgeon Dr. Harold D. Segal, M.D. began treating him on referral from CTF. (Dkt. No. 202-3, "Segal Decl.," ¶ 2.) Between June 2005 and July 2009, Dr. Segal administered epidural steroid injections[1] to Mr. Doyle nine times.[2] In addition, several MRI's of Mr. Doyle's lumbar and cervical spine were ordered and taken throughout this time. (*See* Dkt. No. 202-3 through 202-7, Exh. 1 to Segal Decl.)

On May 7, 2010, Dr. Shahram Ehteshami, M.D. conducted a neurosurgery consultation with Mr. Doyle through the telemedicine system. (Dkt. Nos. 200-6, Exh. A to "Barnett Decl.," part 1 at 77-79.) Following that consultation, Dr. Ehteshami noted that Mr. Doyle "may need neck

[1] The Court notes that the SAC also includes an allegation that Mr. Doyle was not properly returned to Dr. Segal for an epidural steroid injection in July 2006. (SAC ¶ 20.) However, Mr. Doyle does not provide any nexus between this allegation and the named defendants, and so no further analysis is necessary. Likewise, Mr. Doyle has failed to provide evidence of a nexus between events alleged in the SAC pre-dating November 2010 and the named defendants. The Court similarly declines to address the likelihood that Mr. Doyle could prevail on these allegations.

[2] Dr. Segal's records show that the procedures occurred on the following dates: June 10, 2005; July 22, 2005; December 23, 2005; July 14, 2006; November 17, 2006; March 23, 2007; October 12, 2007; September 26, 2008; and July 28, 2009. (*See* Dkt. No. 202-3 through 202-7, Exh. 1 to Segal Decl.)

surgery at C3-4 considering the findings of the 2008 MRI," and recommended a new MRI of the cervical spine. (*Id*.) Dr. Ehteshami then learned of a February 9, 2010 MRI of Mr. Doyle's cervical spine, and upon review thereof, conducted a follow-up neurosurgical consultation with Mr. Doyle via the telemedicine system on November 12, 2010. (*Id*. at 80-83.) In her preliminary report on the November 12, 2010 consultation, Dr. Ehteshami stated in pertinent part:

> RECCOMENDATIONS: In great detail, the findings, including the symptoms and the objective findings and their correspondents as well as the treatment options, including conservative versus surgical treatment options and the risks and benefits were all discussed in great detail. Regarding the proposed surgery of C3-4 decompression, discectomy, fusion, and possible instrumentation and possible corptectomy, the technique used, the reasons for it, the complications related to such surgeries, including damage to the spinal cord and nerve roots, paralysis, loss of sensation, loss of bowel or bladder control and sexual function, hemorrhages which may need blood transfusion, different infections, damage to other systems and organs, failure of the surgery, were all discussed. He was strongly advised that no guarantee can be given as for the effect of the surgery on the pain and his postoperative physical and functional abilities. He was also advised that some of the symptoms and the findings may not be related to the focal C3-4 disk herniation, and obviously those are not going to be addressed through the proposed surgery. All of the patient's questions were answered, and he was strongly advised to think about his options and to let you know about his decision.

(*Id*. at 83.)

Four days later, on November 16, 2010, Mr. Doyle had his first consultation with Dr. Kuersten. (Dkt. No. 200-2, "Kuersten Decl.," ¶ 4.) Defendant Dr. Kuersten, who began working at CTF in October 2010, was assigned to serve as Mr. Doyle's primary care physician at that time. (*Id*. ¶ 3.) During their first consultation, Dr. Kuersten provided Mr. Doyle with requested refills for his pain medication. (*Id.* ¶ 6.) At Mr. Doyle's request, Dr. Kuersten also completed requests for service ("RFS") to CTF medical management on behalf of Mr. Doyle, requesting to see Dr. Segal for epidural steroid injections and a second opinion regarding cervical surgery. (*Id*.) On November 30, 2010, CTF medical management granted the RFS to see Dr. Segal regarding epidural steroid injections, but, upon administrative review, "Dr. Lam" denied the RFS as to the

cervical surgery opinion. (*Id*. ¶ 7.) When Dr. Kuersten met with Mr. Doyle again on December 6, 2010, he prescribed pain medication and also provided Mr. Doyle with a physical limitations chrono[3] that he could present to prison staff to obtain reasonable accommodations. (*Id*. ¶ 8.)

Pursuant to the RFS submitted by Dr. Kuersten and approved by CTF medical management, Mr. Doyle was seen by Dr. Segal on January 4, 2011. In a letter documenting that visit, Dr. Segal recommended the following plan for Mr. Doyle:

> Recommend this gentleman have a CAT scan of the cervical spine to further delineate the bony pathology. Lesions at the C3-4 level tend to be asymptomatic in my judgment; however, this certainly may be a problem for him and should be better delineated by a view of his bony pathology as best seen on a CAT scan. In addition, I would recommend lower epidural steroid injections and will proceed with one injection in the near future. I will see him again in six weeks.

("January 2011 Plan") (Segal Decl., Exh. 1 at 1.) The January 4, 2011 appointment was Mr. Doyle's final visit with Dr. Segal. According to Dr. Segal, had he continued to treat Mr. Doyle, he "would have recommended a lumbar fusion because of the severity of his back pain." (Segal Decl. ¶ 5.)

On January 6, 2011, Dr. Kuersten met with Mr. Doyle for a follow-up consultation regarding his cervical and lumbar spinal pain. (Kuersten Decl. ¶ 11.) In his notes from that visit, Dr. Kuersten noted that, with respect to Mr. Doyle's cervical spine, the RFS for a second opinion was previously denied. (Dkt. No. 200-7, Exh. A to Barnett Decl., part 2 at 2.) With respect to Mr. Doyle's lumbar spine, Dr. Kuersten was awaiting the report from Dr. Segal (ostensibly from Mr. Doyle's January 4, 2011 visit) to determine Mr. Doyle's need for further treatment. (*Id*.) Dr. Kuersten recommended Mr. Doyle's next visit be in 60 days, or approximately March 6, 2011. (*Id*.)

On March 22, 2011, Dr. Kuersten met with Mr. Doyle for his 60-day follow up. (*Id*. at 8.)

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[3] The new physical limitations chrono included: no prolonged standing; no prolonged sitting; no bending, stooping, or twisting; no lifting over 20 pounds; no use of left arm; and no working at heights. (Exh. A to Barnett Decl., part 1 at 87.) Additionally, a comprehensive accommodations chrono was already in place providing Mr. Doyle with a ground floor cell, a bottom bunk, a wood cane, an extra mattress, and a cervical pillow. (Exh. A to Kuersten Decl.)

During that visit, Dr. Kuersten noted that Mr. Doyle met with Dr. Segal on January 4, 2011 and that an RFS for a cervical CAT scan recommended by Dr. Segal had been denied. (*Id.*) Dr. Kuersten discussed other treatment options with Mr. Doyle with respect to the cervical spine, and submitted an RFS for a nerve conduction study ("NCS"). (*Id.*) Again, Dr. Kuersten set a goal for Mr. Doyle to return for a follow up visit in 60 days.

Dr. Kuersten also referred Mr. Doyle to Dr. Darrin Bright, D.O. for an Americans with Disabilities Act consultation that occurred on March 31, 2011. (Kuersten Decl. ¶ 11.) In his report, Dr. Bright noted that Mr. Doyle has had chronic low back pain since 2005, and that he began having severe neck pain as well beginning in around 2008. (Exh. A to Barnett Decl., part 2 at 18-20.) After a physical examination of Mr. Doyle and review of Mr. Doyle's imaging studies, Dr. Bright came to the conclusion that Mr. Doyle had nothing in his low back, legs, or neck that would require Mr. Doyle to have any physical limitations for a job assignment. (*Id.*)

On June 2, 2011, Dr. Kuersten again met with Mr. Doyle for a 60-day follow up appointment. During that visit, Dr. Kuersten updated Mr. Doyle's chrono with continuation of physical accommodations and work limitations. (Exh. A to Barnett Decl., part 2 at 10.) Dr. Kuersten also noted that he submitted an RFS for an NCS, but he recalled the RFS was denied.[4] (*Id.*) Dr. Kuersten scheduled a follow up visit for 90 days, but he had no further interaction with Mr. Doyle due to his transfer from CTF to work in another facility in August 2011. (Kuersten Decl. ¶ 2.)

Following Dr. Kuersten's departure, Mr. Doyle received additional updated chrono's with physical accommodations and work limitations between August and December 2011. (Exh. A to Barnett Decl., part 2 at 23-31.) In December 2011, Mr. Doyle was transferred to another facility. (*Id.* at 31.)

Mr. Doyle testifies that he continues to experience pain in his lumbar and cervical spine. His "symptoms include excruciating neck and back pain, lower back spasms, left flank pain,

[4] The record shows that an NCS was performed on August 10, 2011. (Exh. A. to Barnett Decl., part 2 at 11-17.)

impaired mobility, numbness in my extremities, and the inability to lift heavy objects." (Dkt. No. 202-2, "Plaintiff Decl.," ¶ 4.) Further, Dr. Segal submitted a declaration indicating that he believed the "severity of [Mr. Doyle's] back pain" could have warranted a lumbar fusion to alleviate his lower back pain. (Segal Decl. ¶ 5.) Conversely, defendants' expert Dr. Barnett relies on progress notes from Mr. Doyle's current institution, dated November 6, 2014 and May 10, 2015, to opine that Mr. Doyle "is doing well in a new prison location, where he continues to receive the type of conservative treatment provided by Defendants." (Exh. I to Barnett Decl.; Barnett Decl. ¶ 19.)

B. Plaintiff's Relevant 602 Inmate Appeal

Mr. Doyle filed an inmate health grievance dated December 6, 2010, tracking log no. CTF HC 11005581, institution log no. CTF 14-10-14131 ("602 Appeal"). In his 602 Appeal, Mr. Doyle presented four requests: (i) transfer to a PCP other than Dr. Kuersten; (ii) reassignment to a porter position for his work assignment, as well as a "lay-in" order; (iii) treatment for lower back pain by Dr. Segal, epidural steroid injections, and for Dr. Segal to review his February 2010 cervical MRI for a second opinion on surgery; and (iv) immediate enrollment in physical therapy. (Dkt. No. 84-2, "Nguyen Decl.," Exh. 1 at 48-49.)

On January 6, 2011, a first level review of the 602 Appeal purported to grant Mr. Doyle's requests in part. (Nguyen Decl., Exh. 1 at 50.) Particularly, the response reiterated the treatment for lower back pain already approved and provided. (*Id.*) The first level review, signed by Registered Nurse Valiente, also partially granted Mr. Doyle's request for physical therapy pending Mr. Doyle's submission of the necessary health care services request form. (*Id.*) Otherwise, the first level review denied Mr. Doyle's 602 Appeal requests. (*Id.*)

The second level response to Mr. Doyle's 602 Appeal dated February 18, 2011 was signed by defendant G. Ellis ("Ellis"), Chief Executive Officer of CTF, and defendant Dr. M. Sepulveda, M.D., Chief Medical Executive at CTF. (*Id.* at 51-52.) In that response, defendants Ellis and Dr. Sepulveda denied the 602 Appeal, stating: "[t]here is no medical indication at the time for you be reassigned to a new provider or be enrolled in physical therapy." (*Id.* at 51.) As to Mr. Doyle's request to receive a new work assignment, defendants reiterated in the second level response that

"work assignments are a custody issue and can not [sic] be dictated by medical staff." (*Id*.) In sum, defendants Ellis and Dr. Sepulveda denied Mr. Doyle's second level review in whole. (*Id*.)

Mr. Doyle then submitted a request for third level review, known as director's level of review ("DLR"), dated March 4, 2011.[5] In that request, Mr. Doyle reiterated his dissatisfaction with the first and second levels of review, and underscored the severe pain he continued to experience in connection with his neck and back issues. (*Id*. at 46.) Mr. Doyle further stated that "[d]eliberate delays for specialist treatment [left him] in significant and sever [sic] pain, totally disabling [him] at times and keeping [him] from reasonable independent function; including bladder and bowel control on occasion." (*Id*.)

During the relevant time period, defendant L. Zamora ("Zamora") served as Chief of the Inmate Correspondence and Appeals Branch ("ICAB"), the unit responsible for handling inmates' DLR requests. (Dkt. No. 200-15, "Zamora Decl.," ¶¶ 1-2.) When ICAB receives a DLR request, "medically trained and licensed clinicians review the submitted information along with the appealing inmate's health care records." (*Id*. ¶ 6.) Once the DLR response is drafted by a clinician, Zamora or her designee at ICAB "would review it…and analyze the supplemental information that the clinician used to develop the appeals response." (*Id*. ¶¶ 6-7.) Zamora's review – or her designee's – is "limited to ensure that administrative rules and procedures [are] satisfied in connection with the handling of an inmate's health care grievance." (*Id* ¶ 9.)

With respect to Mr. Doyle's DLR request at issue, Zamora's designee signed the DLR decision letter denying Mr. Doyle's health care grievance at this third level of review. (*Id*. ¶ 7, *id*. at Exh. A.) The DLR decision letter stated in pertinent part:

> At the DLR…it was determined your care related to your appeal issues was adequate, as you received medical treatment, medication was provided and your concerns were appropriately addressed at the [first and second levels of review]…After review, there is no compelling evidence that warrants intervention at the [DLR] as your medical condition has been evaluated by licensed clinical staff and you are receiving treatment deemed medically necessary…No

[5] The DLR decision mistakenly states that plaintiff's request for DLR was submitted on February 25, 2011.

changes or modifications are required by the decision.

(*Id*. at Exh. A.) The DLR decision exhausted Mr. Doyle's administrative remedies, and Mr. Doyle timely instituted this action.

II. STANDARD OF REVIEW

Summary judgment is proper where the pleadings, discovery and affidavits demonstrate that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue for which the opposing party by contrast will have the burden of proof at trial, as is the case here, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id*. at 325.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The court is only concerned with disputes over material facts and "factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. It is not the task of the court to scour the record in search of a genuine issue of triable fact. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of identifying, with reasonable particularity, the evidence that precludes summary judgment. *Id*. If the nonmoving party fails to make this showing, "the moving party is entitled to a judgment as a matter of law." *Celotex*, 477 U.S. at 323.

III. DISCUSSION

A. Deliberate Indifference Under the Eighth Amendment

The Eighth Amendment protects prisoners from inhumane conditions of confinement. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). To prevail on an Eighth Amendment claim for deliberate indifference arising out of inadequate medical care, a plaintiff must show "deliberate indifference" to his "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). "This includes 'both an objective standard—that the deprivation was serious enough to constitute cruel and unusual punishment—and a subjective standard—deliberate indifference.'" *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (citation omitted). Here, defendants concede that Mr. Doyle's pain constitutes a serious medical need. (Mtn. at 16:16.) Thus, only the subjective element of deliberate indifference is at issue.

To satisfy the subjective element of deliberate indifference, the plaintiff must show that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. A plaintiff must establish that the course of treatment the doctors chose was "medically unacceptable under the circumstances" and that they embarked on this course in "conscious disregard of an excessive risk to Plaintiff's health." *Toguchi v. Chung*, 391 F.3d 1051, 1058-60 (9th Cir. 2004) (internal citations and quotations omitted). Indifference may appear "when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." *Hutchinson v. United States*, 838 F.2d 390, 392 (9th Cir. 1988) (citing *Estelle*, 429 U.S. at 106). A claim of mere negligence related to medical problems, or a difference of opinion between a prisoner patient and a medical doctor, is not enough to make out a violation of the Eighth Amendment. *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). Where doctors have chosen one course of action and a prisoner-plaintiff contends that they should have chosen another course of action, the plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances... and the plaintiff must show

that they chose this course in conscious disregard of an excessive risk to plaintiff's health." *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.1996) (internal citations omitted).

For the reasons discussed below, Mr. Doyle has failed to show any triable issue of material fact on his claims of deliberate indifference under the Eighth Amendment against defendants, with the exception of Dr. Kuersten on the single issue of whether he was indifferent to Dr. Segal's January 2011 Plan for epidural steroid injections to the lumbar spine.

1. Defendant Kuersten

Dr. Kuersten acted as Mr. Doyle's primary care physician and treated him while Mr. Doyle was housed at CTF-Soledad between November 2010 and August 2011. Mr. Doyle contends that, during this period, Dr. Kuersten "repeatedly den[ied]" surgical treatment. (Dkt. No. 202, "Oppo.," at 6:23-27.) It is undisputed that Mr. Doyle's cervical and lumbar pain constituted a serious medical need of which Dr. Kuersten was aware.[6] (*See* Mtn. at 16:16; Kuersten Decl. ¶ 4.) Dr. Kuersten contends that he is entitled to judgment as a matter of law on Mr. Doyle's claims because the evidence establishes he was not subjectively indifferent to Mr. Doyle's spinal pain by purposefully failing to respond thereto. The Court agrees that Dr. Kuersten has shown that he was not deliberately indifferent, on the one hand, to Mr. Doyle's requests for cervical and lumbar surgeries. On the other, the Court finds that a material fact is in dispute as to whether Dr. Kuersten was deliberately indifferent in failing to ensure that Mr. Doyle received epidural steroid injections to the lumbar spine after reviewing Dr. Segal's January 2011 Plan.

a. Cervical Spine Condition

The evidence shows that, during the approximately ten months in which Dr. Kuersten acted as Mr. Doyle's primary care physician, he did not act with deliberate indifference to Mr. Doyle's cervical spine pain. Despite Mr. Doyle's assertions that Dr. Kuersten was aware of the recommendation for [cervical] surgery…" but that he "unnecessarily delayed the [cervical]

[6] Mr. Doyle inexplicably argues in his opposition that there is a dispute of fact as to whether Mr. Doyle's conditions presented a serious risk of harm, and whether defendants were aware of Mr. Doyle's serious medical needs. (Oppo. at 5:16-19.) The record is clear, however, that Mr. Doyle's pain constituted a serious medical need of which defendants were aware, and defendants concede that point. (Mtn. at 16:16, 16:26.)

surgery and did absolutely nothing to facilitate his treatment," (Oppo. at 6:16-18.), the record shows otherwise. Dr. Kuersten met with Mr. Doyle for their first consultation just four days after Dr. Ehteshami discussed the potential benefits *and concerns* of cervical surgery with Mr. Doyle. During that initial visit on November 16, 2010, Dr. Kuersten provided Mr. Doyle – at Mr. Doyle's request – with refills for his pain medication, an RFS to see Dr. Segal for epidural steroid injections for his lumbar pain, and an RFS to see Dr. Segal for a second opinion on the cervical surgery discussed with Dr. Ehteshami. Mr. Doyle then saw Dr. Segal on January 4, 2011, to address his lumbar condition. A Dr. Lam, however, denied the RFS for Dr. Segal to provide a second opinion on the cervical surgery on November 30, 2010.

Following their initial November 16, 2010 consultation, Dr. Kuersten continued to treat Mr. Doyle for his lumbar and cervical spinal pain throughout the ensuing months. On December 6, 2010, Dr. Kuersten prescribed further pain medication for Mr. Doyle, and provided a physical limitations chrono to present to prison staff for reasonable accommodations. Dr. Kuersten also met with Mr. Doyle on January 6, 2011, March 22, 2011, and June 2, 2011, and provided Mr. Doyle the following care for his spinal pain: referral to Dr. Bright for an Americans with Disabilities Act consultation; submission of an RFS for NCS; and provision of an update chrono for continuation of physical accommodations and work limitations. After Dr. Kuersten transferred from CTF-Soledad, notes from a consultation with a different primary care physician on November 10, 2011 reflect that Mr. Doyle "declines [cervical] surgery" and has been "stable since 2010." (Exh. A to Barnett Decl., part 2 at 26.)

Mr. Doyle has not introduced evidence that Dr. Kuersten's treatment of his cervical spine condition was medically unacceptable in light of the circumstances. *Jackson*, 90 F.3d at 332. Likewise, the evidence could not support a conclusion that Dr. Kuersten intentionally delayed or denied medical care for Mr. Doyle's cervical spine pain. *Id*. It is undisputed that Dr. Kuersten submitted an RFS for a second opinion on the cervical surgery during his first consultation with Mr. Doyle. Additionally, Dr. Segal informed Dr. Kuersten by letter in January 2011 that, in his professional opinion as a neurosurgeon, Mr. Doyle's lesions at the C3-4 level tended to be asymptomatic. Based on that information, Dr. Kuersten continued to treat Mr. Doyle for his

cervical pain for several months, employing his medical training and judgment to provide appropriate medical care. Mr. Doyle has not introduced any evidence otherwise to raise a genuine issue of material fact.

b. Lumbar Spine Condition

With respect to his lumbar pain, Mr. Doyle asserts that Dr. Kuersten intentionally denied and delayed his access to back surgery, and also denied his access to epidural steroid injections to the lower spine. In support of the first point, Mr. Doyle offers Dr. Segal's declaration for the proposition that "Dr. Segal was considering surgery for Mr. Doyle, and would have prescribed surgery for his back had he continued to treat him." (Oppo. at 5:11-12.) Notably absent from Dr. Segal's declaration, and Mr. Doyle's opposition, is any assertion that Dr. Kuersten could have been aware of Dr. Segal's consideration of a lumbar fusion for Mr. Doyle during the relevant time (when Dr. Kuersten acted as Mr. Doyle's primary care physician). There is also no evidence that Dr. Kuersten intentionally denied Mr. Doyle the opportunity to receive this care from Dr. Segal.

In connection with the epidural steroid injections, it is undisputed that on January 4, 2011, Dr. Segal recommended further injections for Mr. Doyle. It is similarly undisputed that Mr. Doyle was not seen or treated by Dr. Segal at any time after that recommendation. The evidence also shows that that Dr. Kuersten – as Mr. Doyle's primary care physician – did not take any steps to facilitate Mr. Doyle's return to Dr. Segal to receive the epidural steroid injections. Dr. Kuersten has not provided any explanation for this failure, nor has he argued that he made a valid professional judgment based on his medical training not to allow Mr. Doyle to return to Dr. Segal. Accordingly, a dispute remains as to whether Dr. Kuersten denied, delayed, or intentionally interfered with medical treatment recommended by Dr. Segal. *Hutchinson*, 838 F.2d at 392. In other words, whether his failure amounts to deliberate indifference under the Eighth Amendment is an open issue of fact suitable for trial. Summary judgment on this ground is denied.

With respect to Mr. Doyle's other medical claims, at most, he has shown a difference of opinion between himself and his treating physician on whether surgeries were necessary. This alone cannot form the basis of a claim for deliberate indifference under the Eighth Amendment. *Toguchi*, 391 F.3d at 1058-60. Accordingly, no reasonable juror could find that Dr. Kuersten's

actions were wanton to Mr. Doyle's serious medical needs with respect to cervical or lumbar surgery, and Dr. Kuersten is entitled to judgment as a matter of law on this claim on those bases. *See Estelle*, 429 U.S. at 104.

2. Defendant Sepulveda

Mr. Doyle alleges that defendant Dr. Sepulveda was deliberately indifferent to his serious medical needs when he handled the 602 Appeal at the second level of review. The record shows that Dr. Sepulveda was the Chief Medical Executive at CTF during the relevant time. (Dkt. No. 85, "Sepulveda Decl.," ¶ 4.) Although Dr. Sepulveda is a physician, he did not act as Mr. Doyle's primary care physician and did not otherwise provide medical care to Mr. Doyle. (*Id.* ¶¶ 7-8.) Instead, Dr. Sepulveda used his medical training and judgment to review, and in the end deny, Mr. Doyle's 602 Appeal at the second level of review. (*Id.* ¶ 14.) In Dr. Sepulveda's opinion, Mr. Doyle's "requests regarding his medical care were unwarranted or had been satisfactorily addressed through treatment." (*Id.* ¶ 15.)

It appears, although it is not entirely clear, that Mr. Doyle seeks to hold Dr. Sepulveda liable under the Eighth Amendment for the manner in which Mr. Doyle's medical grievance was reviewed. Mr. Doyle has not presented any evidence that Dr. Sepulveda's decision was medically unacceptable under the circumstances or that Dr. Sepulveda denied the 602 Appeal in conscious disregard of an excessive risk to Mr. Doyle's health. *Jackson*, 90 F.3d at 332. Mr. Doyle obviously disagrees with Dr. Sepulveda's decision, but without more, he cannot survive a motion for summary judgment. *Toguchi*, 391 F.3d at 1058-60 (disagreement over the appropriate course of treatment cannot support an Eighth Amendment violation).

The testimony of Dr. Segal, the only evidence Mr. Doyle cites outside of the medical record and his own declaration, does not alter the analysis. Importantly, Dr. Segal does not demonstrate that Dr. Sepulveda's decision on the 602 Appeal was medically unacceptable. Rather, Dr. Segal says that he previously noted Dr. Ehteshami recommended cervical surgery at the C3-C4 level. (Segal Decl. ¶ 4.) Dr. Segal's declaration does not, however, support a conclusion that the cervical surgery was medically necessary. To the contrary, Dr. Segal's January 4, 2011 letter stated that Mr. Doyle's lesions at C3-C4 were "asymptomatic" in his

opinion. (*Id.*, Exh. 1 at 1.) In addition, Dr. Segal now says that he would have recommended a lumbar fusion had he continued to treat Mr. Doyle. (*Id.* ¶ 5.) This treatment, however, was not at issue in the 602 Appeal. Dr. Sepulveda never denied a lumbar fusion, nor is there any evidence that he prevented Mr. Doyle from receiving that treatment.

Based on the above, the Court finds that Mr. Doyle has failed to raise a triable issue with respect to whether Dr. Sepulveda acted with deliberate indifference to his serious medical needs. At most, Mr. Doyle could only demonstrate a difference of opinion between himself as the patient and Dr. Sepulveda's medical judgment, or a difference of medical opinion between doctors, neither of which is sufficient, as a matter of law, to establish deliberate indifference. *Toguchi*, 391 F.3d at 1058-60. Accordingly, Dr. Sepulveda is entitled to judgment as a matter of law on Mr. Doyle's Eighth Amendment claim.

3. Defendants Ellis and Zamora

Mr. Doyle alleges that defendants Ellis and Zamora were deliberately indifferent to his serious medical needs when they handled the 602 Appeal. The record shows that defendants Ellis and Zamora are the CEO at CTF and the Chief of Inmate Correspondence at ICAB, respectively. (Dkt. No. 200-1, "Ellis Decl.," ¶ 2; Zamora Decl. ¶ 1.) Therefore, defendants Ellis and Zamora only had administrative responsibilities concerning Mr. Doyle's 602 Appeal to ensure that the deadlines were met and that issues raised by Mr. Doyle had been addressed by the response. (Ellis Decl. ¶ 9; Zamora Decl. ¶ 9.) Defendant Ellis relied on and deferred to Dr. Sepulveda's medical judgments regarding Mr. Doyle's 602 Appeal. (Ellis Decl. ¶9.) Similarly, Zamora – or her designee – relied on the opinions of the medically trained and licensed clinicians responsible for drafting the DLR appeal response. (Zamora Decl. ¶¶ 6-7.)

Because defendants Ellis and Zamora relied on the expertise of a physician and medically trained clinicians, and served in an administrative capacity, there is no evidence in the record sufficient for a reasonable jury to find their denial of the 602 Appeal amounted to deliberate indifference of Mr. Doyle's serious medical needs. It simply cannot be said that, by signing off on the denials at the second and third levels, defendants Ellis or Zamora disregarded a substantial risk of harm to Mr. Doyle's health by failing to take reasonable steps to abate it. *See Peralta v.*

Dillard, 744 F.3d 1076, 1086-87 (9th Cir. 2014) (en banc) (finding no reasonable jury could find deliberate indifference where a prison official with no medical expertise in the relevant field, acting in an administrative capacity, denied an inmate appeal for medical care after it was reviewed by qualified medical experts); *see also Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988) (finding no constitutional right of prisoners to the proper functioning of a prison administrative appeal system). Accordingly, there is no triable issue of fact as to Mr. Doyle's deliberate indifference claims against Ellis and Zamora. These defendants are entitled to judgment as a matter of law. *See Celotex*, 477 U.S. at 323.

B. State Tort Law Claims for Negligence and Negligence Per Se

Mr. Doyle also asserts that defendants are liable for the same actions under theories of negligence and negligence per se in violation of California Government Code section 845.6. (SAC ¶¶ 35-40.) Defendants move for summary judgment on these state tort law claims, arguing they are meritless, but without citing to any authority in support thereof. As to Dr. Kuersten, defendants contend that he provided "ample medical care" to Mr. Doyle. (Mtn. at 20:17-20.) With respect to Dr. Sepulveda and administrators Ellis and Zamora, defendants claim they could not have been negligent because their roles were limited to reviewing the 602 Appeal. (Mtn. at 20:20-26.)

Defendants, as the moving party, had the initial burden to show an absence of evidence to support Mr. Doyle's claims for negligence and negligence per se. *See Celotex*, 477 U.S. at 323. Defendants have utterly failed to do so. In fact, defendants do not address the elements of either claim. Instead, defendants list the treatment defendants *did provide* Mr. Doyle, and then circuitously conclude that there is no evidence that defendants' decision *not to provide* additional treatment caused any injury to Mr. Doyle. In response to Mr. Doyle's declaration that he continues to suffer from back and neck pain, defendants reply that Mr. Doyle's pain was not caused by defendants' negligence. Defendants' wholly unsupported arguments are insufficient to satisfy their burden on summary judgment to show an absence of evidence to support Mr. Doyle's claims under theories of negligence or negligence per se. *Id.* Defendants' motion on this ground is denied.

C. Qualified Immunity

Defendants additionally move for summary judgment on the ground that, as government officials, they are entitled to qualified immunity on Mr. Doyle's claims. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)), and "spare[s] a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). "[Q]ualified immunity is 'an immunity from suit rather than a mere defense to liability.'" *Pearson*, 555 U.S. at 231 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

Courts assess two factors in determining whether officials are owed qualified immunity: (1) whether the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case. *Id*. at 232, 236. For the reasons set forth above, the Court largely finds that defendants did not act with deliberate indifference in violation of the Eighth Amendment. Accordingly, that same conduct by defendants did not violate Mr. Doyle's constitutional rights, and defendants are entitled to judgment as a matter of law on qualified immunity grounds as to the Eighth Amendment as well as the state tort law claims for negligence and negligence per se. *Rodriguez v. Maricopa Cty. Comm'y College Dist.*, 605 F.3d 703, 711 (9th Cir. 2010) (defendant entitled to qualified immunity where plaintiff cannot show violation of a constitutional right).

On the single issue of epidural steroid injections, however, the Court has concluded that Dr. Kuersten is not entitled to summary judgment on Mr. Doyle's Eighth Amendment claim. Thus, the Court must determine if Dr. Kuersten is nevertheless entitled to qualified immunity. Where, as here, a court denies summary judgment to a prison official on a claim of deliberate indifference, the court may not end the qualified immunity analysis with the first prong. *Estate of*

Ford v. Ramirez-Palmer, 301 F.3d 1043, 1053 (9th Cir. 2002). Instead, the Court must separately undertake the second prong of the qualified immunity analysis. *Id*. Specifically, the inquiry becomes whether it would have been clear to a reasonable officer, knowing what Dr. Kuersten knew, that his failure to facilitate Mr. Doyle's appointment with Dr. Segal to receive the epidural steroid injections posed such a substantial risk of serious harm that doing so would be constitutionally impermissible. *Id*. The key question in this inquiry is whether the state of the law provided "fair warning" that Dr. Kuersten's conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 740 (2002). The Court must take the facts in the light most favorable to Mr. Doyle, the nonmoving party. *Id*. at n. 1.

Dr. Kuersten summarily contends that it could not have been evident to a reasonable official that his actions were deliberately indifferent to Mr. Doyle's medical needs, especially in light of the treatment, medications, and referrals he provided to Mr. Doyle. The record shows that Dr. Kuersten was aware of the January 2011 Plan and that he took no subsequent steps to ensure that Mr. Doyle was returned to Dr. Segal to receive the epidural steroid injections. Dr. Kuersten, in support of his motion, does not point to any evidence to support a finding that a reasonable official would not have known that a decision to *ignore* – or at least to not address – Dr. Segal's recommendation for epidural steroid injections could violate Mr. Doyle's constitutional rights. On this record, the Court finds that the facts, as interpreted in a light most favorable to Mr. Doyle, indicate that Dr. Kuersten had fair warning that his decision not to at least address Dr. Segal's recommendation could violate Mr. Doyle's constitutional rights. *See Hope*, 536 U.S. at 740. Moreover, as discussed in Section III(a)(1)(b), *supra*, a dispute remains as to whether Dr. Kuersten denied, delayed, or intentionally interfered with medical treatment recommended by Dr. Segal, constituting a violation of Mr. Doyle's Eighth Amendment rights. Thus, Dr. Kuersten is not entitled to judgment as a matter of law on qualified immunity grounds with respect to Mr. Doyle's claims for deliberate indifference, negligence, or negligence per se based on the issue of epidural steroid injections.

IV. INJUNCTIVE RELIEF

In its previous order on defendants' motion to dismiss, the Court noted its concern with Mr. Doyle's requests for injunctive relief against the CDCR defendants, given that Mr. Doyle is no longer housed at a CDCR facility. (Dkt. No. 144 at 13:16-24.) Nonetheless, the SAC seeks injunctive relief against all defendants, and defendants did not move for summary judgment on the injunctive relief separately. The Court can discern no basis for this relief in light of the circumstances. Accordingly, Mr. Doyle is hereby **ORDERED TO SHOW CAUSE** why the Court should not dismiss the requests for injunctive relief to properly narrow the issues for trial. In response to this order to show cause, no later than **Tuesday, October 6, 2015**, Mr. Doyle shall file either: (a) a statement of up to **five pages** explaining whether a basis for injunctive relief exists; or (b) a one-page statement setting forth his failure to comply. Failure to file a response as required will be construed as a concession that no basis for injunctive relief exists. In the event Mr. Doyle files a response, remaining defendant Dr. Kuersten may file a response up to **five pages** in opposition to Mr. Doyle's response no later than **Tuesday, October 13, 2015**.

V. CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is **GRANTED** as to defendants Dr. Sepulveda and administrators Ellis and Zamora, and **GRANTED IN PART** as to defendant Dr. Kuersten. The motion is **DENIED IN PART** as to defendant Dr. Kuersten to the extent that plaintiff may be able to recover against defendant Dr. Kuersten for his failure to facilitate plaintiff's epidural steroid injection treatment by Dr. Segal.

This Order terminates Dkt. No. 200.

IT IS SO ORDERED.

Dated: September 23, 2015

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE